

**STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

Law Court Docket No. ARO-21-312

DENNIS WINCHESTER,

Petitioner - Appellant,

v.

STATE OF MAINE,

Respondent - Appellee.

**APPEAL FROM A JUDGMENT OF THE AROOSTOOK COUNTY
UNIFIED CRIMINAL DOCKET**

**APPELLANT'S MEMORANDUM IN SUPPORT OF APPELLANT'S
REQUEST FOR A CERTIFICATE OF PROBABLE CAUSE**

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TABLE OF CONTENTS

| | |
|---|----|
| Table of Cases, Statutes, and Authorities | ii |
| 1. Introduction | 1 |
| 2. Statement of Facts and Procedural History | 1 |
| 3. Argument | 4 |
| Point I The Trial Attorneys Should Have Filed Speedy Trial Motions ... | 4 |
| Point II The Appellate Attorney Should Have Pursued A Speedy ... Trial Claim | 5 |
| 4. The Public Interest | 7 |
| 5. Conclusion. | 7 |
| Certificate of Service | 9 |

TABLE OF CASES, STATUTES, and AUTHORITIES

Cases

Garza v. Idaho, 586 U.S. __ (2019) 6

State v. Winchester, 2018 ME 142, 195 A.3d 506 2, 3, 6

Theriault v. State, 2015 ME 137, 125 A.3d 1163. 2

Constitution

Maine Constitution, Article I, Section 6 6

Rules

Rule 12(b)(1), Maine Rules of Unified Criminal Procedure 7

Rule 19(a)(2)(F), Maine Rules of Appellate Procedure 1

Rule 19(c), Maine Rules of Appellate Procedure 1

MEMORANDUM

Petitioner-Appellant Dennis Winchester respectfully submits this Memorandum under Appellate Rules 19(a)(2)(F) and 19(c) in support of the Appellant's request for a certificate of probable cause authorizing consideration of this appeal on the merits by the Law Court.

1. Introduction

This is an appeal from the denials of Petitioner Winchester's six petitions for post-conviction review. In this appeal Winchester asserts two claims of ineffective assistance of counsel that the PCR court erroneously rejected: (1) that his various trial attorneys failed to move to dismiss the charges against him for the violations of his speedy trial rights, and (2) that his appellate attorney failed to assert on appeal Winchester's speedy trial violations claim.

2. Statement of Facts and Procedural History

In 2014 and 2015 the State initiated multiple prosecutions against Winchester for various alleged burglaries and thefts. In one case (CARSC-CR-2014-147), Winchester was convicted at trial in 2015. On February 18, 2015, in that case, Winchester was sentenced to five (5) years in prison with all but three (3) years suspended. Winchester's appeal from that conviction was denied by this Court in a Memorandum Decision. Mem 15-82.

In or about February, 2015, Winchester started serving the sentence in CR-

14-147. Throughout the time of the various subsequent proceedings Winchester remained incarcerated.

Later, Winchester was prosecuted on multiple other charges, as to one of which (CR-14-545), in November, 2017, he was convicted at a trial and as to all the others, in December, 2017, he entered conditional pleas of no contest (agreed with the State), preserving for appeal the issues of lack of speedy trial, failure to preserve potentially exculpatory evidence, and lack of particularity in various search warrants. At the time of Winchester's November, 2017 trial and December, 2017 pleas, his various cases had been pending for *more than three years*. For example, in CR-14-267, the Complaint was filed on 06/03/2014, and the Indictment was filed on 07/11/2014, but Winchester's no contest plea was not entered until 12/06/2017. 14-267 Docket Record. Under these circumstances (i.e., a criminal case pending for more than three years), a complete failure of defense counsel to file any speedy trial motions "undermines confidence in the outcome of the case." *Theriault v. State*, 2015 ME 137, ¶ 19, 125 A.3d 1163.

Winchester was then (in December, 2017) sentenced to further terms of imprisonment and appealed his convictions to this Court, which affirmed the convictions in a decision dated October 18, 2018. *State v. Winchester*, 2018 ME 142, 195 A.3d 506. Notably, in that appeal, this Court addressed and rejected Winchester's exculpatory evidence claim and search warrant claim, but

Winchester did not raise, and this Court did not address, any speedy trial claim, although the speedy trial claim was briefly mentioned in footnote 4 of the decision. *Id.* ¶12 n. 4, 195 A.3d 506, 509 n. 4.

After this Court affirmed Winchester’s convictions, Winchester timely filed six petitions for post-conviction review, all alleging various claims of ineffective assistance of counsel.

In June, 2021, the PCR court held an evidentiary hearing on the petitions. In July, 2021, the court denied all of the petitions in an extensive, thorough, and careful twenty-five page decision. 07/22/2021 Decision. In its decision, the PCR court noted that “no motions for a speedy trial had been filed in any of the dockets,” *id.* at 5, but Winchester himself had raised a speedy trial question in April, 2015, *id.* at 4 – 5, and one of his trial attorneys raised the issue at the outset of Winchester’s November, 2017 trial, 06/08/2021 Evidentiary Hearing at 18-19.

The PCR court’s decision addressed and rejected many claims asserted by Winchester. In this appeal, Winchester challenges only the PCR court’s denial of his speedy trial claims. In particular, in this appeal, Winchester does *not* challenge the PCR court’s denial of his claims alleging (a) failure to preserve evidence, (b) failure to issue subpoenas, (c) failure to make or properly pursue motions to suppress (relating to scope of warrants, return of property to third parties, and other issues), and (d) failure to properly represent Winchester at the plea hearing.

ARGUMENT

POINT I

The Petitioner's UCD Court Attorneys Should Have Asserted The Petitioner's Speedy Trial Violation Claims In the UCD Court Proceedings

Most of Winchester's various cases dragged on for a long time. The first one to go to trial went to trial relatively quickly, but the rest were greatly delayed. Winchester at various times specifically asked his attorneys to file speedy trial motions. 06/08/2021 Evidentiary Hearing at 11-20. He asked his appellate attorney to make the speedy trial claim a part of his appeal. *Id.* at 18-20. None of his attorneys took the actions requested. 07/22/2021 Decision at 5 (except that at the outset of his November, 2017 trial Winchester's trial attorney raised the issue, 06/08/2021 Evidentiary Hearing at 18-19). In April, 2015, Winchester personally wrote to the Court and inquired about any speedy trial motions that had been filed. *Id.* at 12-14.

The PCR court acknowledged all this speedy-trial-related evidence but denied Winchester's claim anyway after itemizing the various procedural developments in Winchester's cases and concluding that all the delays were justified or excused. 07/22/2021 Decision at 20-24. This was error. The PCR court wrongly substituted its limited PCR-focused judgment about Winchester's

speedy trial claims (or probable claims) for what should have been the UCD court's *de novo* assessment of properly asserted and litigated claims. Winchester's trial attorneys should have filed one or more motions for speedy trial dismissals, and if they had done so, those motions would have been litigated and decided *on the merits on a fully developed record*. That litigation would have included, for example, assessments of whether some of his pending cases should have been treated differently than the others. Instead, the PCR court just lumped all six cases together and excused the greater-than-three-years delays. That was error.

POINT II

The Petitioner's Appellate Attorney Should Have Asserted the Petitioner's Speedy Trial Violation Claims in the Appeal

Petitioner Winchester's claims of speedy trial violations were mentioned in his cases throughout his trial, appeal, and PCR proceedings. 06/08/2021 Evidentiary Hearing at 11-20. In April, 2015, Winchester asked if his attorney had filed any speedy trial motions in his cases. 07/22/2021 Decision at 4. In December, 2017, when Winchester entered his various conditional no contest pleas, he *expressly preserved for appeal* his speedy trial violation claims. *Id.* at 8. Winchester discussed his speedy trial claims with his appellate attorney more than once. 06/08/2021 Evidentiary Hearing at 17-20. But his appellate attorney did not pursue those speedy trial violation claims in his appeal, which caused this

Court to state in footnote 4 of its decision:

Winchester did not present any developed argument concerning his lack of a speedy trial to the trial court or in his briefing to this court. Thus, Winchester is deemed to have abandoned this issue on appeal.

2018 ME 142, ¶12 n. 4, 195 A.3d 506, 509 n.4. Obviously, Winchester never intentionally or knowingly abandoned his speedy trial claims. And he never authorized his appellate attorney to abandon his speedy trial claims.

Winchester's speedy trial claims, if successful, would have provided to Winchester a complete defense to some or all of the charges asserted against him. As a matter of law, the failure to assert Winchester's speedy trial claims on appeal was presumptively ineffective assistance of counsel. *Garza v. Idaho*, 586 U.S. ___ (2019)(defense counsel's failure to file a notice of appeal requested by a defendant was ineffective assistance of counsel *even though the defendant had pleaded guilty and signed appeal waivers* and otherwise had poor prospects for an appeal; "poor prospects" are not "no prospects"). The whole point of the *Garza* decision is that an appellate attorney's opinion that an appeal or appeal argument may not be valid is not a justification to completely forego the appeal or appeal argument in the face of a criminal defendant's request that the attorney proceed with the appeal or appeal argument. Certainly, there was no "downside risk" to Winchester in the assertion of speedy trial claims in the appeal. The PCR court's denial of this claim of ineffective assistance of appellate counsel was error.

4. The Public Interest

This Court must clarify that under Maine law an incarcerated inmate has a speedy trial right under Article I, Section 6 of the Maine Constitution, which provides in part: "In all criminal prosecutions, the accused shall have a right to . . . have a speedy, public and impartial trial." That provision makes no exception for incarcerated inmates. Indeed, incarcerated and sentenced inmates facing charges in new or other cases may need speedy trials *more* than unincarcerated defendants. Simply put, the phrase "all criminal prosecutions" includes criminal prosecutions against incarcerated inmates. An attorney representing an incarcerated inmate in a delayed or much delayed pending criminal case should always assert a speedy trial violation claim in a motion to dismiss filed under M.R.U. Crim. P. 12(b)(1). That's what an ordinary fallible attorney would routinely do in such circumstances.

5. Conclusion

Appellant Dennis Winchester respectfully requests that this Court grant a Certificate of Probable Cause so that (a) the Appellant may have the opportunity to make a full presentation to the Court on a full and organized record of the Appellant's claims, (b) the Court may have the opportunity to make a full, thorough, and careful consideration of the merits of the Appellant's claims, and (c) the Court may clarify the law concerning the speedy trial rights of incarcerated

inmates.

Dated: January 7, 2022

/s/ Lawrence C. Winger

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Certificate of Service

The undersigned Lawrence C. Winger, Esq. hereby certifies that service of a filing was made as follows:

Filing: Appellant's Memorandum in Support of Appellant's Request
for a Certificate of Probable Cause

Served on: DA Todd Collins (by Email & U.S. Mail)
Inmate Dennis Winchester (by U.S. Mail)

Date of Service: January 7, 2022

Dated at Portland, Maine, January 7, 2022

/s/ Lawrence C. Winger

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